

## NON-BINDING PROMISES AS CONSIDERATION

In thousands of cases it has been dogmatically stated that both parties to a contract must be bound or neither is bound. So convincing was this dictum that it has been a painfully slow process to re-introduce to the legal profession the unilateral contract—the only kind of contract that our ancestors knew a few centuries ago. It is still generally believed, even by those who well understand the unilateral contract, that the dictum is quite correct with respect to bilateral contracts; and the suggestion of Professor Oliphant that this may never be so came as a surprise. Everyone had known, indeed, that the dictum did not fully apply to contracts between an infant and an adult, contracts within the Statute of Frauds signed by one party only, and contracts induced by the fraud of one party; but it was loosely supposed that these cases could be harmonized with the dictum by use of the magic words “voidable” and “unenforceable.” Both parties were “bound”; but one had the power of avoidance of the whole, upon the exercise of which neither was bound. It can easily be shown that this analysis is unsound in very many cases;<sup>1</sup> and we must admit that the dictum is subject to many clear exceptions. Have the exceptions, in this case as in so many others, come to occupy the whole field?

The present writer is not yet ready to abandon the dictum altogether; but he is thoroughly convinced that its correctness as a rule of law cannot be established by any mere deductive process based upon some more ancient and general rule of law. It can be established only by a collection of decisions in point; or, if we are willing to trust them, by a collection of the dicta of judges and legal writers. No attempt will be made here to present the collected decisions or dicta.<sup>2</sup> The problem will merely be discussed briefly from the writer's personal point of view.

In neither of the two great systems of law with which we are familiar are all informal promises enforceable. Courts and lawyers,

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<sup>1</sup>In the case of a wholly executory bilateral contract whereby an infant promises to render service and the adult promises payment after full performance, it is no breach of legal duty for the infant to fail to perform. Even in the absence of any disaffirmance, a complaint alleging all the facts would be demurrable. The same is true of a wholly executory bilateral contract induced by the fraud of one of the parties. In an action for breach the defendant can successfully plead the plaintiff's fraud, without showing any notice or other act of disaffirmance or rescission by himself. The existing facts created no duty in him. *Roberts v. James* (1912) 83 N. J. L. 492. Yet in such cases, the defendant could have enforced the contract against the plaintiff.

<sup>2</sup>Professor Oliphant cites numerous legal writers in *Mutuality of Obligation in Bilateral Contracts* (1925) 25 Columbia Law Rev. 705.

therefore, must search for the test or tests by which the enforceable can be distinguished from the unenforceable. In the civil law one of these tests parades under the pseudonym of "causa"; in the common law under that of "consideration." All too readily do we suppose that "the law" on these and other subjects is certain and knowable. All too blithely do we assume that there is only one "correct" definition of terms and one rule of legal sufficiency by which decisions can be tested. In fact the "causa" that in the long history of the civil law made promises binding is an indeterminate and variable quantity.<sup>3</sup> The same is equally true of "consideration." Anglo-American law did not start with a definition or a rule of legal sufficiency. Instead, we have several centuries full of decisions in specific cases, furnishing at every stage in their progress a new inductive basis for definition and stated rule, an ever changing basis on which all alike are free to build, yesterday, now, and forever. Some rules are more persistent than others. It may be that one such rule is that a promise is not a sufficient consideration for a return promise if it can be affirmatively shown that it is not binding on the one who made it.

Let us consider the so-called "illusory promise."<sup>4</sup> Suppose that *S* guarantees *P*'s note in return for *C*'s written promise to forbear from suing *P* as long as *C* wishes so to forbear. *C*'s promise is said to be "illusory," and it is said that *S*'s guaranty is not binding for lack of a sufficient consideration. In what does the "illusion" consist; and why is the consideration not "sufficient" (one that along with other facts will be operative to create a legal duty in *S*)?

If *S* asked *C* for that written form of expression he got exactly what he asked for.<sup>5</sup> If *S* had asked for a different form of expression, he would not have received what he asked for. The case would then be determined by the rules of mutual assent and of mistake, not by the definition of a "sufficient" consideration.

<sup>3</sup> Lorenzen, *Causa and Consideration in the Law of Contracts* (1919) 28 Yale Law Journ. 621.

<sup>4</sup> See my discussion in *The Effect of Options on Consideration* (1925) 34 Yale Law Journ. 571, 573 *et seq.*

<sup>5</sup> Professors Williston and Oliphant (1925) 25 Columbia Law Rev. 719, 860 both say that the contractor requests in return "not simply an expression" but an "assurance in fact." What is an "assurance in fact" other than an expression that expresses something? Surely it is not meant to abandon the objective test of contract and make it depend upon the subjective state of mind of either the promisor or the promisee. When a contractor requests a certain "expression," he does not request a word with the tongue obviously in the cheek; in such case he does not get the requested *expression*. But when two parties sign a written document with numerous terms in specific language, each gets exactly the expression and the "assurance" that he requests, despite the fact that there may be contained only an illusory semblance of a promise by the other party. When he requests this particular written "assurance" he is not asking for a state of mind; he cannot escape contractual duty on the ground that the words mean less than he supposed.

Even if *S* got exactly what he asked for and was under no mistake or illusion as to what he got, still the promise of *C* has been described as "illusory." The reason for this is that by the ordinary concept of "promise" the "illusory promise" is not a promise at all. The fundamental element of promise seems to be an expression of intention by the promisor that his future conduct shall be in accordance with his present expression, irrespective of what his will may be when the time for performance arrives.<sup>6</sup> This element is wholly lacking if the expression is like that of *C* above where he said that he would forbear as long as he wished so to do. The clear meaning of this expression is that *C*'s future conduct is to be in accordance with his own future will, just as it would have been had he said nothing at all. In the absence of mistake as to what was said by *C* there is nothing illusory about this. An "illusory promise" is merely a group of words that lack the principal definitional element of a promise.

It may be that many of the cases holding a seemingly bilateral agreement invalid when one of the expressions is not in fact a promise can be explained on the ground of mistake or lack of mutual assent—the "illusory promise" made was not the promise that was asked for.<sup>7</sup> In some of them the decision is expressly based upon the doctrine of consideration.<sup>8</sup> It is to be observed that in such cases the court is dealing with a unilateral, not a bilateral contract. There is only one promise made; and strictly the case is not within our present subject. But such agreements are usually spoken of as bilateral; and the reasons why the "illusory promise" is not a sufficient consideration are probably identical with those given for holding that a real promise is not sufficient if it can be shown to be not binding.

<sup>6</sup> Professors Williston and Oliphant (1925) 25 Columbia Law Rev. 719, 860 a volition to set some objective limits to one's freedom of action."

<sup>7</sup> In *Great Northern R. R. v. Witham* (1873) L. R. 9 C. P. 16, the defendant offered to supply all goods that the Railroad might order of him. The Railroad replied promising to buy all that it might so order. This reply contains an "illusory promise"; but it was not responsive to the offer. The true response was an order for goods, with its implied promise to pay a specific sum; when such a response came there was an acceptance making a good bilateral contract. *Chicago & G. E. R. R. v. Dane* (1870) 43 N. Y. 240 was decided rather on the ground of lack of proper acceptance than for lack of sufficient consideration. In *Hopkins v. Racine Iron Co.* (1909) 137 Wis. 583, 119 N. W. 301, the defendant promised to furnish castings as ordered. Both parties seem to have thought that this promise was a contract; but the plaintiff made not even an "illusory promise" in return. Prior to acceptance by ordering some castings the defendant promised to furnish castings as ordered. Both parties seem to have thought *Sheffield* (1895) 144 N. Y. 392, 39 N. E. 330. Probably most of the cases saying that both parties must be bound are cases where one party gave nothing whatever, not even an "illusory promise".

<sup>8</sup> *Oscar Schlegel Mfg. Co. v. Peter Cooper's Glue Factory* (1921) 231 N. Y. 459, 132 N. E. 148. The court interpreted the buyer's written words as being a promise to buy such glue as it might thereafter order of the defendant. The words were "contract for your requirements of glue for the year 1916," the

Why does not the community regard the "illusory" or the non-binding promise as a good reason for using compulsion against the other party? Is it because "in the eye of the law" it has no "value"?

It is doubtful whether the idea of "value" in an economic sense played any large conscious part in the development of the doctrine of consideration. The courts have uniformly refused to go into the question of *relative* values, except to establish fraud or the absence of a bargain in fact.<sup>9</sup> "Value" is determined by the existence of a market; and a bargain in fact proves that one market exists. The value depends upon the appetite of him who buys. The law of consideration is not made to assist the poor buyer in his struggle for life. To some slight degree, however, the validity of a bargain may be determined by extrinsic markets. Possibly a consideration is not sufficient unless there are such extrinsic markets to give it some value. The markets for "illusory" and non-binding promises are no doubt few and weak. Yet it seems never to have been stated that a consideration is insufficient in case no market other than the present buyer can be shown to exist.

Professor Williston agrees that there are considerations having economic value that are nevertheless not legally sufficient to make a return promise binding.<sup>10</sup> Further, he does not assert that considerations having no economic value are never sufficient. Value in the economic or factual sense not being the test, he falls back upon "legal value," or "value in a technical sense," or "value in the eye of the law."<sup>11</sup> How are we to define "legal" value, or "technical" value or "legal eye" value? It is believed that the only way is to observe the

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document being marked "accepted" by the buyer. "The defect ... is that it contains no express consideration, nor are there any mutual promises from which such consideration can be fairly inferred . . . . The only obligation assumed by it was to pay nine cents a pound for such glue as it might order . . . . Unless both parties to a contract are bound, so that either can sue the other for a breach, neither is bound." We might differ with the court in its interpretation of the buyer's words and arrive at a different result; but the court rested the decision on lack of sufficient consideration and not on want of mutual agreement. See also *Wickham & B. Coal Co. v. Farmer's Lumber Co.* (1920) 189 Iowa 1183, 179 N. W. 417: "Appellant does not deny that a promise may be a consideration for a promise. Its position is that this is so only of an enforceable promise. That is the law."

<sup>9</sup>As, for example, in *Keller v. Holderman* (1863) 11 Mich. 248.

Of course, the question whether consideration has some "value" is not identical with that of relative values. The law might require that extrinsic markets shall show that a consideration has some value without requiring that they shall show that the exchanged considerations have the same value.

<sup>10</sup>*Op. cit.*, footnote 5, p. 865.

<sup>11</sup>When in *Thomas v. Thomas* (1842) 2 Q. B. 851, Patteson, J., said that "consideration means something of some value in the eye of the law," he said nothing further about "value in the eye of the law" as a test of sufficiency. His main point was that it had to be something "moving from the plaintiff." This point he proceeded to illustrate and apply. Even as to this, his statement is not now prevailing law in the United States. Moreover, the "eye of the law" is notoriously of impaired vision.

working of the technical legal eye, to list the decisions and thus discover what considerations (some with economic value and some without) have been held to be sufficient. Thus the cart is put before the horse; and instead of "value" determining the decisions, the decisions determine "value." This list of decisions must in any event be made; by them we shall determine what considerations are sufficient, and also (if the matter seems to be of any importance) what considerations have "value in the eye of the law." If they show that non-binding promises have been held to be insufficient consideration, they may also be said to show that non-binding promises have no "legal value"; but they cannot be said to show that they are insufficient consideration *because* they have no "legal value".

In exactly the same way, "detriment" and "benefit" became ineffective in determining the sufficiency of consideration. Since many considerations that were not detrimental or beneficial in any economic or factual sense were held to be sufficient, and others that were admittedly detrimental or beneficial were held to be not sufficient, it became customary to say that the test of sufficiency was "legal detriment" or detriment "in a technical sense" or detriment "in the eye of the law." The very thing we wish to know was what considerations "the eye of the law" looked upon as sufficient, and this can be determined only by an inductive collection of decisions—the very collection necessary to determine what considerations are "legal detriments" or detriments "in a technical sense" or detriments "in the eye of the law."<sup>12</sup>

It appears, therefore, that if an "illusory" or other non-binding promise is not a sufficient consideration, the rule is not reached by a mere process of deduction from a supposedly more general rule that consideration must have "legal value" or be a "legal detriment." Such a particular rule may be a correct one; but its correctness must be shown by an inductive collection of decisions in point. If such deci-

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<sup>12</sup> A similar error could be made in using the term "sufficient consideration." If "consideration" is defined in a purely factual sense (as we define "value," or "detriment" or "benefit"), to wit: "an act, forbearance, or promise requested and given in exchange for a promise," it ceases to denote with exactness one or more of those operative facts that make a contract. Some considerations within the definition will not help to make a contract; and in many sorts of cases an informal contract can be made without any consideration at all. We therefore add a qualifying adjective and say that the only kind of consideration that will help to make a contract is a "sufficient" consideration. Observe, now, that there is not the slightest possibility of determining the enforceability of a promise by the use of this concept deductively. To say that a void promise will not make a return promise binding because the law requires a "sufficient" consideration is a glaring example of begging the question. Its defects are no different in kind, however, from those involved in saying that a void promise is not a sufficient consideration *because* it has no "legal value" or "value in the eye of the law." It is not the quality of "sufficiency" that causes a court to hold a certain consideration to be "sufficient."

sions exist, it is possible that they may be explained on the ground that the courts regard such a consideration as having too slight an economic value; the general markets for such a commodity are too few and too weak. They may perhaps be explained on the ground that the courts thought the consideration too slight an economic detriment or benefit. Or, they might be explained on some other ground of social policy. It is conceivable that the sufficiency of consideration might be determined by some particular standard of economic value or by some specified degree of factual detriment; but the writer believes that the decisions do not justify the construction of a rule on any such basis.

The only possible generalization, the deductive use of which does not involve a begging of the question, is one that is constructed out of factual elements that in the past have induced courts to act or that a lawgiver declares must induce courts to act. In a new case possessing those factual elements the court's action may be predicted with a moderate degree of confidence but not with certainty.

Professor Williston writes: "The test of 'value in the eye of the law' remained and is in substance the same for both classes of cases—a 'legal' detriment to the promisee or 'legal' benefit to the promisor—something which changes the legal position that the party giving or receiving the consideration occupied prior to the bargain."<sup>13</sup> This sentence suggests a definition, not only of "legal value" and "legal detriment," but also of "sufficient consideration." It is "something which changes the legal position . . ." A definition so worded cannot be relied on.

The consideration in a unilateral contract may be such as to operate *per se* to change the "legal position" of the promisee. When such is the case, this may be an added reason for holding the consideration to be sufficient. Thus, if the promisee releases a mortgage he extinguishes his property interest; if he surrenders or cancels a promissory note, he extinguishes his right to payment; if he rejects an offer, he destroys his power of acceptance; if he hands over a gold piece or a book, he extinguishes his property interest in the chattel. All these performances, changing legal position, are sufficient as a consideration.

A consideration may be sufficient, however, even though it changes not a single legal relation of either the promisee or the promisor. A change or forbearance to change one's *physical* position is quite sufficient; so also, a *forbearance to change* one's legal position (for-

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<sup>13</sup> *Op. cit.*, footnote 5, p. 866. The present writer's objections to "legal detriment" as a definitional term have been stated above. "Legal detriment" has been defined as any act or forbearance not already required by existing legal duty. This does not beg the question; but it does not accurately define "sufficient consideration."

bearance to use a power) is just as sufficient as is a change therein. If at request, a promisee (having made no promise, tacit or express) plows a field or swims the Hudson or forbears to smoke for a year<sup>14</sup> or forbears to accept an offer that has been made him,<sup>15</sup> he is not changing a single one of his legal relations; and yet all of these are sufficient considerations. From beginning to end of these performances, after the bargain is made and during its making, the performer and the promisor had every right, power, privilege, and immunity that he had prior thereto. If there are any other legal relations not included under the foregoing terms, they too are unchanged.

It has been urged by a few that the time has come to abandon the requirement of a consideration; but the existing decisions show that the courts would not now follow such a rule.<sup>16</sup> It might be urged that a promise should be made binding by any act, forbearance, or promise bargained for in fact as the equivalent of a promise; again, existing decisions do not permit of such a rule. It may be urged that a non-binding promise is sufficient to make a return promise binding, even though the second does not and cannot make the first binding. In determining whether the courts will in fact follow this rule (whether it is "the law"), we cannot rely upon any "deduction" from some more general rule that a consideration is not sufficient unless it has value (either factual or "legal"), or that a consideration is not sufficient unless it is a detriment (either factual or "legal") to the promisee or a benefit (either factual or "legal") to the promisor. Even though these concepts (especially factual "detriment" and "benefit") may have play-

<sup>14</sup> See *Hamer v. Sidway* (1891) 124 N. Y. 538, 27 N. E. 256. If in this case the nephew *promised* that he would forbear to smoke, and if under the law this promise is binding, he changed his legal position, in that he extinguished his privilege of smoking (undertook a duty to the uncle not to smoke). Even in the case of such a bilateral contract the change in legal position is the result of the contract; the contract is not the result of a change in legal position. But even if the nephew made no promise at all, his actual forbearance as requested would be sufficient consideration; and yet at every moment of such performance, and afterwards too, he remained legally privileged to smoke.

See the excellent statements in *Strong v. Sheffield*, *supra*, footnote 6, and *Miles v. Alford Estate Co.* (1886) L. R. 32 Ch. D. 266 (*per* Lord Bowen).

<sup>15</sup> See *White v. McMath* (1913) 127 Tenn. 713, 156 S. W. 470. Likewise, forbearance to make an offer is not prevented from being a sufficient consideration because it does not change one's legal position. *Hopkins v. Ensign* (1890) 122 N. Y. 144, 25 N. E. 306.

<sup>16</sup> It is true that in certain classes of cases the requirement has already long been abandoned, if we accept as the definition of consideration one favored by many writers: "an act, forbearance, or promise requested and given in return for a promise." The many sufficient "past considerations" are by this definition, as Sir William Anson truly says, no consideration at all; and the same is true in those cases holding that subsequent action in reliance on a promise makes it binding even though such action was "no more than a condition or a natural consequence of the promise." Holmes, C. J., in *Martin v. Meles* (1901) 179 Mass. 114, 60 N. E. 397.

ed a considerable part in the development of the law, they have not so restrained its development that a consideration is not now sufficient unless the requirement indicated by these terms exists. This is shown by modern decisions dispensing with such a requirement. We must start anew, therefore, and construct inductively from the collected decisions down to date a new definition of "consideration," a new definition of "sufficient consideration," and a new rule determining the enforceability of promises. Such a rule may be safe for a decade as a basis for the decision of new cases that appear to fall within its terms. It is certain that new notions will gradually make it more or less unsafe thereafter and that new definitions and rules will be constructed by our successors.

An answer to the question under discussion—whether a promise that itself remains not binding on its maker is generally (or at least in some cases) not sufficient to make a return promise binding—is indicated by the following:<sup>17</sup> (1) The dictum that both parties to a bilateral agreement must be bound or neither is bound is inveterate.<sup>18</sup> (2) Many cases have held that a promise is made insufficient as a consideration if the promisor reserves an "option to cancel."<sup>19</sup> (3) There are decisions holding that an "illusory promise" is not sufficient consideration for the reason that it is not binding (and not for the reason that it was not the requested equivalent or that no equivalent was, in fact, requested).<sup>20</sup> (4) If two promises, one of which is void for illegality, are made by *A* in exchange for one lawful promise by *B*, it has been said that *B*'s promise is void and not sufficient consideration for the one lawful promise made by *A*.<sup>21</sup> An exhaustive study of the cases in these fields, along with those in which void and voidable promises are held to be sufficient consideration, is necessary in order to deter-

<sup>17</sup> The list here made is merely suggestive, not exhaustive.

<sup>18</sup> The writer is quite willing to abandon such a dictum if actual decisions have undermined it, whether intentionally or unintentionally, through ignorance, forgetfulness, or fiction. Many another equally glittering phrase and doctrine has been shown to be a "wind ball that has gone bouncing down the ages." Phelps, *Falstaff and Equity* (1901) 45, 46. Professor Williston appears to be right, however, when he indicates that there is no obvious social demand for the abolition of the rule.

<sup>19</sup> 1 Williston, *Contracts* (1920) § 105; Page, *Contracts* (2d ed. 1922) § 572. The present writer believes that the rule has been applied in cases where it should not have been. See *The Effect of Options on Consideration* (1925) 34 Yale Law Journ. 471, *passim*. The cases show none the less the attitude of the courts on the problem involved in this article.

<sup>20</sup> See *supra*, footnote 8.

<sup>21</sup> 3 Williston, *op. cit.*, footnote 19, §§ 1780, 1782; Page, *op. cit.*, footnote 19, § 1031. The cases cited as authority for this appear to be doubtful and confused. They involve the distinction between the terms "void" and "illegal" and are much concerned with questions of divisibility. The law appears to be stated *contra* in 13 Corp. Jur. 512, citing many cases unconfirmed by the present writer. See also *Erie Ry. v. Union Loco. & Ex. Co.* (1871) 35 N. J. L. 240, and *Sarco Co. v. Gulliver* (N. J. Eq. 1925) 129 Atl. 399, apparently *contra*.



mine the extent to which the rule requiring mutuality of obligation still prevails. A statement of where the rule ends and the exceptions begin is not a simple matter.

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